



**LAND AND PROPERTY RIGHTS TRIBUNAL**

**Citation:** Condominium Corporation No. 9511752. v Calgary (City), 2023 ABLPRT 493

**Date:** 2023-09-06

**File No.** NM2023.0001 (Related File Nos. NM2022.0008 and NM2022.0005)

**Order No.** LPRT2023/EX0493

The Land Compensation Board (“LCB”) is continued under the name Land and Property Rights Tribunal (“Tribunal”), and any reference to Land Compensation Board or Board is a reference to the Tribunal.

**In the matter of a proceeding commenced under** the *Expropriation Act*, RSA 2000, Chapter E-13 (the “*Act*”).

**And in the matter of** an Application by Notice of Motion.

BETWEEN:

Condominium Corporation No. 9511752

Applicant

and

The City of Calgary.

Respondent

BEFORE: Harold Williams, Presiding Member  
Andreea Bandol  
Timothy S. Meagher  
(the “Panel”)

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**ORDER**

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**APPEARANCES**

**Written Submissions only were filed by:**

For the Applicant: Garrett Finegan and Stacy McFarlane, Borden Ladner Gervais LLP

For the Respondent: Andrew Barbero and Jeff Watson, Law, Legal Services, The City of Calgary

## INTRODUCTION

[1] The Applicant sought an oral hearing, seizing of the Panel, and costs for the present application. The Panel concluded that the Applicant's procedural fairness had been compromised due to the Respondent raising a new argument for the first time in its rebuttal. Although there was no compelling reason for ordering an oral hearing, principles of procedural fairness require that the Applicant have an opportunity to respond to all of the arguments raised by the Respondent. Accordingly, the Panel directed the parties to file further written submissions on a narrow issue. In addition, the Panel declined to seize itself of the hearing on the Motion to Strike. Lastly, the Panel awarded costs for this motion to the Applicant in accordance with s. 39 of the *Act*.

## BACKGROUND

[2] The Applicant Condominium Corporation No. 9511752 ("Lewis Lofts" or the "Applicant") is registered under the *Condominium Property Act*, RSA 2000, c C-22 in respect of a condominium building located at 240 –11th Avenue SW in Calgary, Alberta (the "Property").

[3] The Respondent City of Calgary (the "City" or the "Respondent") is a municipality as defined in the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*").

[4] On July 26, 2022, Lewis Lofts filed an application with the Tribunal pursuant to sections 29 and 39 of the *Expropriation Act*, RSA 2000, c E-13 (Tribunal file NM2022.0005) (the "Compensation Motion"). In the Compensation Motion, Lewis Lofts sought legal and other costs incurred due to the City's alleged expropriation of the Property.

[5] On August 15, 2022, the parties participated in a Dispute Resolution Conference ("DRC") to discuss the procedural steps for the Compensation Motion. At the DRC, the City raised a concern about the Tribunal's jurisdiction to hear the Compensation Motion on the basis that the City did not expropriate the Property. The parties agreed that the City's application regarding the Tribunal's jurisdiction will be heard before the Compensation Motion. As a result, Lewis Lofts' Compensation Motion was held in abeyance.

[6] On September 2, 2022, the City filed an application and a brief in support (Tribunal file NM2022.0008) (the "Motion to Strike"). In the Motion to Strike, the City sought to strike Lewis Lofts' Compensation Motion on the basis that the Tribunal did not have jurisdiction to hear the Compensation Motion.

[7] Between September 2, 2022 and December 2, 2022, the parties filed their respective submissions and evidence regarding the Motion to Strike:

1. September 2, 2022: the City filed its brief in support of the Motion to Strike ("Initial Brief for the Motion to Strike").
2. September 30, 2022: Lewis Lofts filed its reply brief in the Motion to Strike ("Reply Brief for the Motion to Strike") and the affidavit of Brett Jackson.
3. October 17, 2022: the parties attended another DRC to discuss the procedural steps for the Motion to Strike. The parties agreed to deadlines for filing written submissions for the Motion to Strike.
4. November 16 and 18, 2022: Cross-examination on the affidavit of Brett Jackson.
5. December 2, 2022: the City filed its rebuttal brief in response to Lewis Lofts' Reply Brief for the Motion to Strike ("Rebuttal Brief for the Motion to Strike").

[8] On December 15, 2022, the parties attended a follow-up DRC, which was scheduled at the request of Lewis Lofts. Lewis Lofts claimed that the City's Rebuttal Brief for the Motion to Strike raised a new issue and that this gave rise to procedural fairness concerns. As a result, Lewis Lofts requested an opportunity to further respond to the City's Rebuttal Brief for the Motion to Strike. The City opposed Lewis Lofts' request for further submissions. Instead, the City requested that the written materials already filed in the Motion to Strike be forwarded to the panel assigned to decide the Motion to Strike. One of the outcomes of the December 15, 2022 DRC was that Lewis Lofts would seek client instructions to file an application for a Tribunal order allowing Lewis Lofts to file a surrebuttal brief to the City's Rebuttal Brief for the Motion to Strike.

[9] On January 16, 2023, Lewis Lofts filed the application presently before the Panel (Tribunal file NM2023.0001) (the "Procedural Motion"). In the Procedural Motion, Lewis Lofts sought: (a) that the Motion to Strike be heard orally; (b) that the panel hearing the Procedural Motion be seized for the hearing of the Motion to Strike; and (c) an order for costs for the Procedural Motion.

## ISSUES

[10] This Procedural Motion raises the following issues:

1. Has Lewis Lofts' procedural fairness been compromised?
2. If Lewis Lofts' procedural fairness was compromised, what is the appropriate remedy?
3. Should this Panel seize itself of the Motion to Strike hearing?
4. Is Lewis Lofts entitled to costs for the Procedural Motion?

## DECISION

[11] The Panel decided:

1. Lewis Lofts' procedural fairness has been compromised.
2. The Panel denied the request for an oral hearing but granted the parties an opportunity to file supplementary written submissions to address the new issue raised by the City in its Rebuttal Brief for the Motion to Strike. The supplementary written submissions are limited to the following issue: whether an interest of land was taken and the resulting effect on the Tribunal's jurisdiction to hear the Compensation Motion. The parties' supplementary written submissions shall be filed in accordance with the following schedule:
  - (i) Lewis Lofts' supplementary submission due within 30 days of this Order, on Friday, October 6, 2023.
  - (ii) City's supplementary submission due within 31 days of Lewis Lofts' supplementary submission, on Monday, November 6, 2023.
3. The Panel is not seized of the Motion to Strike hearing.
4. The Panel awards Lewis Lofts costs for the Procedural Motion (NM2023.0001) in accordance with s. 39 of the *Act*, regardless of the outcome of the Motion to Strike (NM2022.0008). The quantum of costs is to be assessed at the conclusion of the Compensation Motion (NM2022.0005).

**PARTIES' POSITIONS IN THE PROCEDURAL MOTION*****Lewis Lofts' Position in the Procedural Motion***

[12] Lewis Lofts' claims that its procedural fairness in the Motion to Strike has been compromised because the City fundamentally changed its position regarding the Tribunal's jurisdiction to hear the Compensation Motion. It says that the City has engaged in "case-splitting" and that it is attempting to litigate the Compensation Motion by installments.

[13] In support of this argument, Lewis Lofts highlights differences between the City's position in the Initial Brief for the Motion to Strike and in the Rebuttal Brief for the Motion to Strike. At issue is the prerequisites that must exist for the Tribunal to have jurisdiction to hear the Compensation Motion. Lewis Lofts argues that the City advanced a new position for the first time in its Rebuttal Brief for the Motion to Strike. As a result, Lewis Lofts claims that it has not had an opportunity to respond to the City's new argument. In Lewis Lofts' view, the City's new position could have and should have been advanced in the City's Initial Brief for the Motion to Strike. Lewis Lofts argues that the City's change of position in its Rebuttal Brief for the Motion to Strike "gives rise to significant and prejudicial procedural unfairness."<sup>1</sup>

[14] Lewis Lofts argues that it attempted to solve these procedural unfairness concerns by requesting the opportunity to file a further reply. However, the City refused and insisted that Lewis Lofts file a separate application and obtain a Tribunal order to that end. In Lewis Lofts' view, the City's refusal to consent to Lewis Lofts' further reply is an attempt by the City to gain an unfair procedural advantage and to shield itself from scrutiny by the Tribunal.

[15] Lewis Lofts maintains that there is an unresolved dispute between the parties on whether the strategy and position in the City's Rebuttal Brief for the Motion to Strike are improper and procedurally unfair. In its view, this Panel must only determine whether Lewis Lofts' procedural fairness concerns are "potentially viable and unresolved" and should be brought to the attention of the panel hearing the Motion to Strike.<sup>2</sup> Lewis Lofts argues that the procedural unfairness can only be remedied by holding an oral hearing for the Motion to Strike, so that the parties can "assert their respective positions" and "the Tribunal can provide advice and direction [...] to ensure that the Motion to Strike proceeds with procedural fairness."<sup>3</sup> Lewis Lofts further submits that the panel hearing the Procedural Motion should seize itself and hear the Motion to Strike in order to "promote consistency and efficiency."<sup>4</sup>

***The City's Position in the Procedural Motion***

[16] The City denies that its Rebuttal Brief for the Motion to Strike contained a change of position or that it is litigating by installments. In its view, the Rebuttal Brief for the Motion to Strike was a "proper reply confined to the information and arguments proffered" by the Lewis Lofts' Reply Brief for the Motion to Strike.<sup>5</sup>

[17] The City opposes the request for an oral hearing on the basis that the Tribunal has already established a written hearing process for the Motion to Strike and that both parties have agreed to that process. In its view, transitioning to an oral hearing at this stage would cause further delays and would prejudice the City. The City is concerned that an oral hearing would give Lewis Lofts an opportunity to raise new or additional arguments for the first time, thus "effectively [...] ambushing the City."<sup>6</sup>

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<sup>1</sup> Lewis Lofts' Notice of Motion filed on January 16, 2023 for the Procedural Motion, para. 9.

<sup>2</sup> Lewis Lofts' Brief filed on February 15, 2023 for the Procedural Motion, para. 28.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> City's Brief filed on March 15, 2023 for the Procedural Motion, para. 47.

<sup>6</sup> *Ibid.*, para. 20.

[18] The City does not agree that the Procedural Motion and the Motion to Strike should be heard by the same panel. It claims that it would be significantly prejudiced if the panel hearing the Procedural Motion would seize itself to hear the Motion to Strike. Its concern is that if the same panel hears both motions, “then the argument will have been made in both motions regardless of the [...] decision in the Procedural Motion rendering the within proceedings moot.”<sup>7</sup>

## **PARTIES’ POSITION ON THE MOTION TO STRIKE**

[19] The parties’ arguments filed in the Motion to Strike are tightly interwoven. As a result, it is necessary for this Panel to examine in more detail the parties’ respective submissions regarding the Tribunal’s jurisdiction to hear the Compensation Motion.

### ***City’s Initial Brief for the Motion to Strike***

[20] The City moved to strike out Lewis Lofts’ Compensation Motion on the basis that the Tribunal lacked jurisdiction to hear the Compensation Motion. The City’s Notice of Motion to Strike listed the following grounds:

3. For the Tribunal to determine whether Lewis Lofts is entitled to the relief sought in NM2022.0005, expropriation proceedings must have been commenced by filing a Notice of Intention to Expropriate (“NOITE”) at the Alberta Land Titles Office.
4. The City has not filed a NOITE at the Alberta Land Titles Office with respect to any estate or interest in lands owned by Lewis Lofts or in the Property, or in relation to any owner or occupier of the Property, which is required by section 8 of the *Act*. Moreover, no interest in land or estate from the Property has been acquired by The City from Lewis Lofts, whether by expropriation or by any other means, nor have any statutory steps been taken to expropriate an estate or interest in land from the Property.

[21] In its Initial Brief for the Motion to Strike, the City argued that the Tribunal lacked jurisdiction because the City did not file a NOITE at the Alberta Titles Office. After reviewing the process set out in the *Act* for commencing an expropriation, the City highlighted the importance of a NOITE in this process.<sup>8</sup> It then continued:

7. The City has **never** filed a NOITE in respect of the Property. [...] As expropriation proceedings have not been commenced under the *Expropriation Act*, the Tribunal lacks the requisite jurisdiction to determine Lewis Lofts’ claim for the relief sought in NM2022.0005 [emphasis added].<sup>9</sup>

[22] The City then set out the provisions in the *Act* that give the Tribunal authority to hear claims and award compensation in expropriation matters, as well as caselaw authorities about when the Tribunal’s jurisdiction is engaged. The City reiterated its position as follows:

10. For the Tribunal to have jurisdiction under the *Expropriation Act* to determine the relief sought by Lewis Lofts in NM2022.0005, expropriation proceedings would have had to be commenced pursuant to section 8 of the *Expropriation Act* as set forth in paragraph 6 above.

11. As The City has not commenced proceedings to expropriate land, or an estate or interest

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<sup>7</sup> *Ibid.*, para. 48.

<sup>8</sup> City’s Initial Brief dated September 2, 2022 for the Motion to Strike, para. 6.

<sup>9</sup> *Ibid.*, para. 7.

in land, of Lewis Lofts or any occupant of the Property, the *Expropriation Act* has not been engaged and the Tribunal does not have jurisdiction to determine the relief sought by Lewis Lofts in NM2022.0005.

[...]

17. The City has not filed or served Lewis Lofts with a NOITE, with the result that the *Expropriation Act* has not been engaged. Because the *Expropriation Act* has not been engaged, the Tribunal does not have the jurisdiction to determine the relief sought by Lewis Lofts in NM2022.0005.
18. The authorities cited support the conclusion that, for the Tribunal to have jurisdiction under the *Expropriation Act* to determine the relief sought by Lewis Lofts in NM2022.0005, expropriation proceedings would have had to be commenced pursuant to section 8 of the *Expropriation Act*.
19. As The City has not commenced proceedings to expropriate land, or an estate or interest in land, of Lewis Lofts or any occupant of the Property, the *Expropriation Act* has not been engaged and the Tribunal does not have jurisdiction to determine the relief sought by Lewis Lofts in NM2022.0005.<sup>10</sup>

***Lewis Lofts' Reply Brief for the Motion to Strike***

[23] Lewis Lofts argued that the City had improperly framed the issue as one of jurisdiction. It argued that the City is really seeking a determination that the expropriation did not occur and, therefore, Lewis Lofts is not entitled to compensation. According to Lewis Lofts, this is not a question of jurisdiction. Rather, it is a question of law (i.e., what does “expropriation” means under the *Act*) and a finding of fact (i.e., whether an expropriation occurred on the facts of this case).<sup>11</sup> Lewis Lofts argued that the Tribunal’s jurisdiction and the application of the *Act* are triggered by “expropriations” as defined in the *Act*. It argued that “whether, and when” such an “expropriation” has occurred in this case is a central issue before the Tribunal.”<sup>12</sup>

[24] Lewis Lofts challenged the City’s proposition that the expropriation can only occur with the filing and the service of a NOITE. It pointed out that the definition of “expropriation” under the *Act* does not refer and is not limited by section 8 of the *Act*. In its view, “expropriation” has a broader meaning than that advanced by the City. It cautioned that the City’s argument that “expropriation” means proceedings commenced by the filing of a NOITE would effectively narrow down the definition of “expropriation” in a way not intended by the statute.<sup>13</sup>

[25] After reviewing the legislative framework applicable to expropriations, Lewis Lofts stated: “consistent with its remedial nature, the *Act* broadly defines “expropriation” as “the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers.”<sup>14</sup> Lewis Lofts then provided argument on the meaning of “taking of land” and argued that the facts in this case amounted to expropriation within the meaning of the *Act* and occurred in this case.

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<sup>10</sup> *Ibid.*, paras. 10-11, 17-19.

<sup>11</sup> Lewis Lofts’ Reply Brief dated September 30, 2022 for the Motion to Strike, para. 2.

<sup>12</sup> *Ibid.*, para. 4.

<sup>13</sup> *Ibid.*, paras. 16-17, 23.

<sup>14</sup> *Ibid.*, para. 23.

***City's Rebuttal Brief for the Motion to Strike***

[26] In rebuttal, the City agreed with Lewis Lofts that an “expropriation can take multiple forms,” but argued that the Tribunal “does not have the authority to determine compensation where no interest was taken.”<sup>15</sup>

[27] After addressing Lewis Lofts’ arguments, the City concluded that the Tribunal does not have jurisdiction to hear the Compensation Motion because no NOITE was filed, nor was there was a taking of an interest in land:

15. To be clear, The City is not asserting that the filing of a NOITE is necessary in all cases for the LPRT to have jurisdiction to hear matters. What The City is asserting is that no interest was taken from Lewis Lofts or the Property, a fact confirmed by Lewis Lofts’ affiant. Therefore, in order for the LPRT to have jurisdiction to make a ruling where no interest was taken, the only prescribed avenue for compensation is an abandoned expropriation which, under the *Expropriation Act*, requires a NOITE. **Absent a NOITE or a taking of interest in land**, the LPRT has no jurisdiction to determine compensation [emphasis added].<sup>16</sup>

**ANALYSIS**

**1. Has Lewis Lofts’ procedural fairness been compromised?**

[28] The dispute in this Procedural Motion centers on whether Lewis Lofts’ procedural fairness has been compromised due to the City’s allegedly raising a new argument for the first time in its rebuttal materials filed in the Motion to Strike.

***Comparison of City’s Initial Brief and its Rebuttal Brief for the Motion to Strike***

[29] A comparison of the City’s Initial Brief and its Rebuttal Brief reveals that the City’s position changed.

[30] In its Initial Brief for the Motion to Strike, the City’s primary argument was that “[t]he Tribunal’s jurisdiction is **only** triggered when expropriation proceedings have been commenced under the *Expropriation Act*” [emphasis added].<sup>17</sup> Since the City had not commenced expropriation proceedings against Lewis Lofts by filing a NOITE, the *Act* had not been engaged and, therefore, the Tribunal lacked jurisdiction to hear the Compensation Motion. The City clearly stated this position in paragraphs 7, 10, 11, 17-19 of the Initial Brief, as reproduced above.

[31] By contrast, the City’s Rebuttal Brief for the Motion to Strike stated that the filing of a NOITE is not necessary in all cases for the Tribunal to have jurisdiction. Instead, it took the position that the Tribunal does not have jurisdiction to determine compensation where no interest was taken. It then combined its positions in the Initial Brief and the Rebuttal Brief in the following statement: **Absent a NOITE or a taking of interest in land**, the LPRT has no jurisdiction to determine compensation [emphasis added].<sup>18</sup>

[32] Based on the foregoing, the Panel finds that the City changed its position between its Initial Brief for the Motion to Strike and its Rebuttal Brief for the Motion to Strike. The addition of the words “or a taking of interest in land” in the City’s Rebuttal Brief is crucial here. The Initial Brief stated the

<sup>15</sup> City’s Rebuttal Brief dated December 2, 2022 for the Motion to Strike, para. 12.

<sup>16</sup> *Ibid.*, para. 15.

<sup>17</sup> City’s Initial Brief dated September 2, 2022 for the Motion to Strike, para. 5.

<sup>18</sup> City’s Rebuttal Brief dated December 2, 2022 for the Motion to Strike, para. 15.

commencement of expropriation proceedings was the only prerequisite for the Tribunal acquiring jurisdiction. Since a NOITE had not been filed and, thus, expropriation proceedings had not been started, the Tribunal did not have jurisdiction. In the Rebuttal Brief, the City stepped back from this categorical position when it stated that the filing of the NOITE or the taking of an interest in land would confer jurisdiction upon the Tribunal. It is clear that the City expanded its focus in the Rebuttal Brief once Lewis Lofts challenged the legal validity of the City's initial argument.

[33] The City claims that the Motion to Strike was a response to the Compensation Motion. As such, the Motion to Strike was "necessarily influenced" by the information provided by Lewis Lofts in the Compensation Motion. Since Lewis Lofts did not mention the taking of an interest in land in the Compensation Motion, the City's Initial Brief for the Motion to Strike focused solely on the filing of a NOITE. The City states that the reason it discussed the taking of an interest of land in its Rebuttal Brief is because it was replying to a line of argument raised in Lewis Lofts' Reply Brief for the Motion to Strike

[34] The Panel is not persuaded by this argument for the following reasons.

[35] First, the City's Notice of Motion to Strike specifically referred to an interest in land being acquired.

Moreover, no interest in land or estate from the Property has been acquired by The City from Lewis Lofts, whether by expropriation or by any other means, nor have any statutory steps been taken to expropriate an estate or interest in land from the Property.<sup>19</sup>

However, the Initial Brief did not argue how the Tribunal's jurisdiction may have been affected where no interest of land was taken. The City's primary focus in the Initial Brief was on the lack of a NOITE to initiate expropriation proceedings and the resulting lack of jurisdiction.

[36] Second, the City listed the definition of "expropriation" under section 1(g) of the *Act* (para 9) and briefly mentioned "a taking of land" (para 13) in its Initial Brief. The definition of "expropriation" in the *Act* contains the words "the taking of land."

[37] These references to "the taking of land" suggests that the question of whether an expropriation had occurred, so as to trigger the Tribunal's jurisdiction, was a live issue in the Motion to Strike. Yet, in the Initial Brief, the City's argument regarding the Tribunal's jurisdiction was predicated on the fact that the City had not commenced expropriation proceedings under the *Act* by filing a NOITE. Indeed, this argument is reiterated in five different paragraphs, as discussed above. No other arguments were advanced in the Initial Brief.

[38] Nothing prevented the City from advancing an alternative argument in the Initial Brief that the Tribunal had not acquired jurisdiction over the Compensation Motion because no interest in land had been taken. The Rebuttal Brief explored for the first time in detail the "no interest in land was taken" argument. This is not a case where the City's Rebuttal Brief furthered original arguments.

[39] It is trite law that parties should present their entire argument in the first instance in order to afford the other party opportunity to make a full response. This Panel concludes that the City's argument in its Rebuttal Brief is substantially different from the argument presented in its Initial Brief. As a result, Lewis Lofts did not have a chance to fully respond to the City's new argument that the Tribunal did not have jurisdiction because no interest in land was taken. For this reason, the Panel concludes that Lewis Lofts' procedural fairness has been compromised.

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<sup>19</sup> City's Notice of Motion to Strike dated September 2, 2022, para. 4



### ***Case Splitting and Litigation by Installments***

[40] Lewis Lofts argued that the City has engaged in “case splitting” and “litigation by installments.” The City challenges this characterization and argues that its Rebuttal Brief is a “proper rebuttal that is limited only to the new arguments and cases raised by Lewis Lofts in their response.”<sup>20</sup>

[41] This Panel finds that this is not a case of either case splitting or litigation by installments.

[42] Generally speaking, the rule against case splitting applies to the introduction of evidence, rather than argument. Case splitting refers to using rebuttal as an opportunity present additional evidence that could have been presented in the first instance:

Where there was a single issue only to be tried, (he [sic] party beginning must exhaust his evidence in the first instance and might not split his case by first relying on prima facie proof, and when that had been shaken by his adversary, adducing confirmatory evidence.<sup>21</sup>

[43] While case splitting has been said to also regulate argument and reply submissions at the hearing of a motion,<sup>22</sup> the Alberta Court of Appeal explained the rule against case splitting as an evidentiary rule:

[32] “Case splitting” is more of a trial issue. By the time the parties have finalized the form of the pleadings and completed all of the pretrial procedures the issues and points of contention should be clear, and they should be able to present all of their evidence at one time. Interlocutory applications can be more fluid than that: *Kissel v Rocky View (County)*, 2020 ABQB 406 at para. 89. A party may omit evidence inadvertently, or on the assumption that the point is not disputed. Another situation is where the respondent raises a positive defence, for example the expiry of a limitation period. There is nothing objectionable about an applicant supplementing the record when that occurs. Case splitting is objectionable to the extent that it attempts to take tactical advantage of withheld evidence, or it results in the inefficient use of court resources, but it can generally be dealt with by costs, adjournments, or case management. On an interlocutory application exclusion of the “split” evidence is rarely a proportionate remedy, except where there was a failure to make proper disclosure on an *ex parte* application.<sup>23</sup>

[44] The caselaw reviewed by this Panel suggests that the typical scenario where litigation by installments arises is where a litigant loses a proceeding and then brings a second proceeding that raises an issue that could have been raised in the earlier proceeding.<sup>24</sup> The Alberta Court of Appeal found that litigation by installment had occurred where a party raised an issue in a new action that reasonably should or could have been raised in the original.<sup>25</sup> However, there is recognition that litigation by installments may occur “if a party raises at a late stage an issue that could have been raised at an earlier point, especially after a trial has concluded.”<sup>26</sup> In either case, litigation by installments is a condemnable tactic

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<sup>20</sup> City’s Brief filed on March 15, 2023 for the Procedural Motion, para. 14.

<sup>21</sup> *Elgert v Home Hardware Stores Limited*, 2010 ABQB 66, para. 3, citing *Allcock Laight & Westwood Ltd v Patten, Bernard and Dynamic Displays Ltd.*, [1996] O.J. No. 1067.

<sup>22</sup> *Johnson v North American Palladium Ltd.*, 2018 ONSC 4496, para. 12.

<sup>23</sup> *Guillevin International Co v Barry*, 2022 ABCA 144, para. 32.

<sup>24</sup> *Polaris Financial Management Limited v AuVert Mining Group Inc*, 2022 ABQB 419, paras 32-39.

<sup>25</sup> *Argentia Beach (Summer Village) v Warshawski*, 1991 ABCA 322.

<sup>26</sup> *Polaris Financial Management*, *supra*, para. 32.

because it is “interminable”<sup>27</sup> and duplicative, and thus it is an abuse of process.<sup>28</sup>

[45] The Panel finds that the concepts of case splitting and litigation by installments, as they have been interpreted by the Courts, do not apply in the present situation. There was no case splitting, as the City did not provide fresh evidence in its Rebuttal. However, the City’s Rebuttal Brief raised a different argument about what constitutes an expropriation from the one it advanced in its Initial Brief. Similarly, this is not a case of litigation by installments as that term has been interpreted by the Courts. The City did not commence a second proceeding on similar facts, after losing the first proceeding.

### ***Summary***

[46] The facts do not support a finding of case splitting or litigation by installments and there is no evidence to suggest that the City tried to set a “litigation trap”<sup>29</sup> for Lewis Lofts.

[47] Nonetheless, the City did advance a new argument in its Rebuttal Brief, without a satisfactory explanation for not addressing this issue in its Initial Brief. As a result, Lewis Lofts has not had an opportunity to squarely address the City’s new argument. This offends the principle of procedural fairness, which encompasses parties’ ability to respond.

## **2. If Lewis Lofts’ procedural fairness was compromised, what is the appropriate remedy?**

[48] Having concluded that Lewis Lofts’ procedural fairness was compromised, this Panel must decide the appropriate remedy.

[49] Lewis Lofts argued that the only way to address its procedural fairness concerns is by ordering an oral hearing. The City opposed this request, noting that the parties have already agreed that the Motion to Strike should proceed by written submissions and that an oral hearing at this late stage will cause further delays and prejudices the City.

[50] The Panel was not provided with a compelling reason why an oral hearing is necessary. Nonetheless, principles of procedural fairness and natural justice require that Lewis Lofts have an opportunity to reply to the new argument raised by the City in its Rebuttal Brief.

[51] In order to safeguard procedural fairness and principles of natural justice, this Panel will give both parties the opportunity to file supplementary briefs on the following issue: whether an interest of land was taken and the resulting effect on the Tribunal’s jurisdiction to hear the Compensation Motion. This is not an invitation to the parties to reargue the issues already raised in the Initial Brief, the Reply Brief or the Rebuttal Brief.

## **3. Should this Panel seize itself of the Motion to Strike hearing?**

[52] Having declined Lewis Lofts’ request for an oral hearing, this Panel must still consider whether it should seize itself of the hearing of the Motion to Strike.

[53] Lewis Lofts requested that the Panel hearing the Procedural Motion should seize itself of the oral hearing of the Motion to Strike for efficiency and consistency reasons. In support of this request, Lewis Lofts argued:

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<sup>27</sup> *Argentia Beach, supra*, para. 5.

<sup>28</sup> *Gilewich v Gilewich*, 2007 SKCA 44, paras. 7-8.

<sup>29</sup> *Johnson v North American Palladium Ltd.*, 2018 ONSC 4496, para. 46.

If the Tribunal determines the Motion to Strike without addressing, or even being aware of, this procedural fairness dispute, there is a clear risk that procedural unfairness will taint the Tribunal's decision and leave it subject to reversal on appeal.<sup>30</sup>

[54] This Panel rejects this argument. The panel hearing the Motion to Strike will have the benefit of this Panel's decision and reasons on the Procedural Motion. From a natural justice perspective, the panel hearing the Motion to Strike is constrained to the facts and submissions filed in that motion, not on materials filed in a previous motion. So, save for this decision, the details of this Procedural Motion will likely largely be irrelevant to the panel hearing the Motion to Strike.

[55] The Panel is similarly not persuaded by Lewis Lofts' argument that consistency and efficiency would be achieved by the Panel seizing itself. The effect of this Panel seizing itself may cause additional administrative challenges and may prevent the timely hearing of the Motion to Strike.

[56] This Panel is guided by the Court of Appeal's comments in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 92 (at para.11). The random assignment of Tribunal members to matters before the Tribunal is an important component of impartiality. On the facts before us, there is no overriding benefit to this Panel seizing itself.

[57] Accordingly, this Panel declines to seize itself of the hearing of the Motion to Strike.

#### **4. Is Lewis Lofts entitled to costs for the Procedural Motion?**

[58] Lewis Lofts requested that the City pay forthwith Lewis Lofts' costs related to this Procedural Costs on a full indemnity basis.

[59] At the December 15, 2022 DRC, Lewis Lofts indicated that it wished to file a response to the new arguments in the City's Rebuttal Brief. The City refused to consent. At that point, Lewis Lofts was faced with two choices: (1) that the materials on the Motion to Strike be forwarded to a panel (without Lewis Lofts' reply to the City's new argument); or (2) bring a further motion to permit it to file a reply to the City's Rebuttal. Lewis Lofts proceeded with the filing of the Procedural Motion.

[60] The Panel finds the City's refusal precipitated the filing of the Procedural Motion. Although Lewis Lofts did not succeed in its request for an oral hearing, it did succeed on its initial request, namely, to file a response to the new argument advanced in the City's Rebuttal Brief. This Procedural Motion could have been avoided had the City consented to Lewis Lofts' request. Furthermore, the City's refusal resulted in further delaying these proceedings.

[61] As a result, the Panel awards Lewis Lofts costs for this Procedural Motion in accordance with s. 39 of the *Act*, regardless of the outcome of the Motion to Strike. The said costs are to be assessed at the conclusion of the Compensation Motion.

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<sup>30</sup> Lewis Lofts' Brief filed on February 15, 2023 for the Procedural Motion, para. 28.

**Order**

[62] The Panel makes the following order:

1. The parties shall file supplementary written submissions in the Motion to Strike.
2. The supplementary written submissions are limited to the following issue: whether an interest in land was taken and the resulting effect on the Tribunal's jurisdiction to hear the Compensation Motion.
3. The parties' supplementary written submissions shall be filed in accordance with the following schedule:
  - (i) Lewis Lofts' supplementary submission due within 30 days of this Order, on Friday, October 6, 2023.
  - (ii) City's supplementary submission due within 31 days of Lewis Lofts' supplementary submission, on Monday, November 6, 2023.
4. The Panel is not seized of the Motion to Strike.
5. Lewis Lofts is awarded costs for this Procedural Motion (NM2023.0001) in accordance with s. 39 of the *Act*, regardless of the outcome of the Motion to Strike (NM2022.0008). Said costs are to be assessed at the conclusion of the Compensation Motion (NM2022.0005).

Dated at The City of Calgary in the Province of Alberta this 6<sup>th</sup> day of September, 2023.

**LAND AND PROPERTY RIGHTS TRIBUNAL**



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Andreea Bandol, Member